

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch**

Backwoods Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0245018

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of Backwoods Grocery (hereinafter “Backwoods Grocery” or “Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against Backwoods Grocery.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that “[A] food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may . . . file a written request for review of the administrative action with FNS”.

CASE CHRONOLOGY

The USDA conducted an investigation of the compliance of Backwoods Grocery with Federal SNAP law and regulations during the period August 16, 2021 through September 13, 2021. The investigation report documents that personnel at the Appellant firm, in addition to accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items on four occasions, also exchanged SNAP benefits for cash during one undercover compliance visit.

As a result of evidence compiled from this investigation, the Retailer Operations Division charged the Appellant, in a letter dated October 27, 2021, with trafficking in SNAP benefits as defined under 7 CFR § 271.2 as the buying or selling of SNAP benefits for cash or consideration other than eligible

food. The charge letter noted that the penalty for trafficking (Exhibit F) is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The Retailer Operations Division also charged the Appellant with accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items (Exhibits C, D, E, and F) in violation of 7 CFR § 278.2(a). The letter further informed the Appellant that the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5). The letter also stated that under certain conditions, FNS may impose a hardship civil money penalty (CMP) in lieu of a disqualification as provided in 7 CFR § 278.6(f)(1).

The letter stated that the Appellant had the right to respond to the charges within 10 days of receipt. The letter also stated that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i). Per UPS confirmation of delivery, the charge letter was delivered to the Appellant at the store address of record on October 28, 2021. The Appellant was advised that the firm would be subject to serving the disqualification for the sale of ineligible items even if the firm meets all the conditions for a CMP in lieu of permanent disqualification.

In a response to the Retailer Operations Division of October 28, 2021, the Appellant replied to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

After giving consideration to the Appellant's response and the evidence in this case, the Retailer Operations Division informed the Appellant, by letter dated November 9, 2021, that Backwoods Grocery was permanently disqualified from participation as a retail store in the SNAP. The determination letter also stated that the Appellant was not eligible for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations as the Appellant did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked November 16, 2021, the Appellant, through counsel, requested an administrative review of the permanent disqualification determination. FNS granted the Appellant's request for administrative review by letter dated November 19, 2021.

The record reflects that via email of December 8, 2021, counsel requested that FNS produce all records reviewed by the Retailer Operations Division or which will be reviewed by the Administrative Review Branch (ARB) in connection with the Appellant's disqualification from the SNAP and this administrative review proceeding, including (but not limited to) all receipts for all purchases by the undercover investigator at the store. Counsel also requested that if this request will be treated as a Freedom of Information Act (FOIA) request, that ARB hold the administrative review in abeyance pending production of all responsive records. Counsel was subsequently advised by the Administrative Review Officer that any requests for documents/information related to the Retailer Operations Division's case against the Appellant must be done so through the FNS FOIA process and counsel was provided the appropriate email for filing such a request. Counsel was also advised that effective October 26, 2020, changes to 7 CFR § 278.6 and 7 CFR § 279.4 went into effect which allow FNS to take administrative action against a firm, even if the firm has submitted a FOIA request or appeal for records. FNS policy notes that under no circumstance may a FOIA request or appeal for records submitted on or after October 26, 2020 delay or prohibit FNS from making a determination regarding disqualification or penalty against a firm, or delay the effective date of a disqualification or penalty.

Via email correspondence of December 10, 2021, the Appellant, through counsel, submitted additional information in support of the request for administrative review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is covered in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 2021(b)(3)(B) states, in part:

... a disqualification under subsection (a) shall be ... permanent upon ... the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards ...[Emphasis added.]

7 CFR § 271.2 states that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

7 CFR § 278.6(e)(1)(i) states:

FNS shall ... disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, in part:

Trafficking means the buying or selling of coupons, ATP cards or other benefit instruments for cash or consideration other than eligible food ...

7 CFR § 271.2 defines eligible food, in part, as:

Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption

7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system....

7 CFR § 278.6(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking ... if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.

7 CFR § 278.6(b)(2) states, in part:

(ii) Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence as specified in § 278.6(i), that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).

(iii) If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such a penalty.

SUMMARY OF CHARGES

During an investigation conducted during the period August 16, 2021 through September 13, 2021, the USDA conducted seven undercover compliance visits at Backwoods Grocery. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated October 27, 2021. The investigation report included Exhibits A through G which provide a narrative on the results of each compliance visit. The investigation report documents that personnel at the Appellant firm, in addition to accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items on four occasions (Exhibits C, D, E, and F), exchanged SNAP benefits for cash (SNAP benefit trafficking) during one undercover compliance visit (Exhibit F).

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the reply to the charge letter, in the request for administrative review, and in subsequent correspondence, the Appellant, through counsel, made the following summarized contentions, in relevant part:

- Although he manages the store, the owner was not on the premises on September 3, 2021 when the transaction referenced in Exhibit F took place. The owner is knowledgeable about all matters related to the firm's SNAP authorization.
- The Appellant has been authorized for SNAP participation since March 2019. At no time has the Appellant been accused of trafficking or other SNAP program violations.
- The Appellant has been short staffed lately due to COVID and it is stressful for a person working long hours. The owner does his best to make sure he and his employees follow the SNAP rules and regulations and has trained all store employees on the SNAP regulations.
- The charge letter accused the store of "accepting SNAP benefits in exchange merchandise which . . . included common ineligible non-food items". Also, the charge letter also alleged that the store engaged in trafficking on September 3, 2021. While the charge letter generally referenced 7 CFR § 271.2 and "trafficking", it did not advise which sub-section of the definition of "trafficking" the store is alleged to have violated. This alone warrants dismissal of the charge letter.
- During each occasion, the investigator purchased eligible food items from the store with SNAP benefits.
- The first substantive paragraph of Exhibit F investigation report details a routine SNAP transaction involving eligible food items. The second substantive paragraph details the alleged sale of one SNAP-eligible and two SNAP-ineligible items. The second paragraph further alleges that the investigator allegedly requested "cash off of his card, and the clerk agreed". The clerk allegedly gave the investigator \$20.00 from the register and attempted to run his EBT card as a credit card transaction for that amount plus the three items purchased. After that failed, the store clerk processed his transaction as an EBT transaction.
- The charge letter and Exhibits omit critical factual information regarding the events that transpired during the investigation. These omissions and misrepresentations, coupled with the owner's and clerk's declarations, reveal that a preponderance of the evidence does not establish that the store intentionally and knowingly engage in an exchange of SNAP benefits for cash.
- FNS cannot place more weight on a declaration from a USDA investigator than on the sworn declarations submitted. This is especially true since the Appellant has had no opportunity to question or cross examine the investigator. No legal basis exists for FNS to give additional weight to a declaration from a USDA employee or contractor simply because he works directly or indirectly for the Federal government.
- The Appellant and its owner expressly dispute and deny most of the factual contentions in the investigation reports. Exhibit F does not fully or accurately describe the events that took place.
- Upon investigation of the allegation, the owner determined that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was on duty on September 3, 2021.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) started work at the store during Mid-August. September 3, 2021 was the first day that she worked at the store without being supervised by the owner.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was confused by the investigator's request and believed that he wanted to pay via credit card and to receive a cash advance. She attempted to use the store's terminal to process the purchase of three items and the cash advance as a credit card transaction. She tried to process that as a credit card transaction on two occasions. After it was declined a second time, she saw that the investigator had an Alabama EBT card and therefore, believed she was processing the transaction as an EBT cash back transaction.
- In Alabama, two types of benefits may be loaded on an EBT card (Family Assistance (FA/TANF) and SNAP benefits). FA benefits can be used on all items and beneficiaries can

also receive their benefits in cash. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is aware that both types of benefits can be loaded on an EBT card because she used to be a beneficiary. As such, she reasonably thought that the investigator sought to access those benefits, not SNAP benefits.

- It is not unreasonable to conclude that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) never heard the investigator state he wanted to exchange cash back on his EBT card. Even if the investigator's representation that he stated that he wanted cash back on his EBT card, it does not follow that she heard or understood that he wanted cash back in exchange for SNAP benefits.
- It is clear that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was properly trained and that neither she nor any store employees had any prior inclination to engage in trafficking in SNAP benefits. All interactions with 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were commenced exclusively by the investigator who attempted to entrap her into violating SNAP regulations.
- The Appellant derived no benefit whatsoever from the alleged \$20.00 cash back transaction.
- A preponderance of evidence does not exist establishing that the ineligible items sold at Backwoods Grocery in exchange for SNAP benefits (Exhibits C through F), involved "common nonfood items" or were the result of "carelessness or poor supervision by the firm's ownership or management". FNS has not defined the term "common non-food items" in its regulations or guidance. As a result, FNS improperly concluded all ineligible items as "common non-food items". This is inappropriate and violates the Administrative Procedures Act and the Food and Nutrition Act of 2008.
- While the clerks in Exhibits C, D, E, and F may have been careless when they permitted the acceptance of SNAP benefits for ineligible items, there is no evidence that the owner or management was careless or failed to properly supervise the store's clerks. Per the owner's declaration, all employees have been trained on the SNAP rules. The owner also has daily involvement in the store. FNS does not expect for store owners to review each and every SNAP transaction conducted by its clerks. Accordingly, FNS should have issued a warning letter.
- The owner is implementing some strategies to ensure that these violations do not occur in the future. First, the owner will be upgrading the store's cash register where it will determine EBT categories by scanning items instead of the cashiers putting in items manually. Secondly, the owner will spend more time training employees until they are comfortable with the SNAP rules.
- The Appellant serves a community of over 500 families, most of which depend on the Appellant as a grocery store. The Appellant is a well-stocked convenience store attached to a gas station in an impoverished neighborhood in rural Scottsboro, Alabama. Many of the items sold at the Appellant are staple food items.
- According to the FNS SNAP Retailer Locator, there are no other SNAP authorized retailers located within five miles of the Appellant. Few SNAP beneficiaries in the Swearingin neighborhood have cars and many of the store's customers walk to the store to purchase eligible food items.
- The Appellant was not afforded a full and fair opportunity to seek review of all such records. No receipts and documentary evidence were provided with the charge letter or when requested by counsel on December 8, 2021.
- Any agency determination based on records never provided to a SNAP retailer is inequitable, unfair, and has discriminatory impacts on retailers based on their religion and national origin, in violation of USDA's civil rights regulations and policies. The owner is Indian-American who practices the Hindu faith.

In support of these contentions, the Appellant, through counsel, submitted the following documents for review:

- October 27, 2021 charge letter with Enclosure;
- Investigative Transaction Report (Exhibits A – G);
- October 28, 2021 store owner email response to the letter of charges;
- November 9, 2021 determination letter;
- Letter of Representation signed by store owner on November 12, 2021;
- Declaration of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), store owner, dated December 9, 2021; and
- Declaration of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), former store clerk, dated December 9, 2021.

ANALYSIS AND FINDINGS

Trafficking Violations

This review is to either validate or to invalidate the determination made by the Retailer Operations Divisions; it is limited to the facts at the basis of the Retailer Operations Division's determination at the time it was made.

The owner contends that although he manages the store, he was not on the premises on September 3, 2021 when the transaction referenced in Exhibit F took place. The owner is knowledgeable about all matters related to the firm's SNAP authorization. The clerk in Exhibit F started work at the store during Mid-August. September 3, 2021 was the first day that she worked at the store without being supervised by the owner.

However, prior to becoming authorized to participate in the SNAP, the Appellant completed and submitted a SNAP Application for Retail Stores. When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

Regardless of who the store owner utilizes to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf.

The Appellant contends that the charge letter and Exhibits omit critical factual information regarding the events that transpired during the investigation. These omissions and misrepresentations preclude FNS from concluding that the Appellant or its clerk intentionally and knowingly engaged in trafficking. FNS cannot place more weight on a declaration from a USDA investigator than on the sworn declarations submitted.

The charges of violations are based on the findings of a formal USDA investigation conducted of the compliance of Backwoods Grocery with Federal SNAP law and regulations during the period August 16, 2021 through September 13, 2021. The transactions cited in the letter of charges were conducted by a USDA investigator and are thoroughly documented. Investigators are trained thoroughly before entering any retail establishment and all protocols, including but not limited to what can and cannot be said. Investigators sign, under penalty of perjury, that investigative reports are true and correct.

All transactions are fully documented and a complete review of this documentation has yielded no known error or discrepancy in the reported findings. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. The investigation report documents by a preponderance of the evidence that a store employee in Exhibit F committed trafficking violations as defined under 7 CFR § 271.2 by buying or selling SNAP benefits for cash or consideration other than eligible food.

The documentation on record includes EBT receipts and photos showing that 9 ineligible nonfood items and 20 eligible food items were purchased with SNAP benefits by the investigator and that the clerk in Exhibit F exchanged an unknown amount of the investigator's SNAP benefits for \$20.00 in cash. The photos on record also show the ineligible nonfood items and eligible food items purchased with SNAP benefits and the \$20.00 cash/bill with serial numbers that was given to the investigator by the employee in exchange for SNAP benefits on the investigator's EBT card. Also on record is documentation that confirms that the ineligible nonfood items and the eligible food items were donated to and signed for by a charitable organization following the transaction. Such documentation includes the signature and title of the official of the charitable organization accepting the donated item, the name and address of the organization, the date the donation was made, and the official's initials next to the items donated. Moreover, the total purchase costs of each of the transactions involved in the investigation is documented on SNAP terminal receipts obtained during each transaction and matches the reported purchase totals indicated in the investigation report.

The Appellant contends that the clerk was confused by the investigator's request and believed that he wanted to pay via credit card and to receive a cash advance. She attempted to use the store's terminal to process the purchase of three items and the cash advance as a credit card transaction. She tried to process that as a credit card transaction on two occasions. After it was declined a second time, she saw that the investigator had an Alabama EBT card and therefore, believed she was processing the transaction as an EBT cash back transaction. As such, she reasonably thought that the investigator sought to access cash those benefits, not SNAP benefits.

The investigation report documents that on September 3, 2021 (Exhibit F), a female employee accepted an unknown amount in SNAP benefits for \$20.00 in cash. Exhibit F of the investigation report states, in part:

“5 U.S.C. § 552 (b)(7)(E).”

The Appellant submitted no evidence that the clerk was under the belief that the investigator's EBT card had cash benefits under Family Assistance (FA/TANF) or the SNAP program. Also, investigators do not have cash benefits loaded on their EBT cards and as such, the clerk would be unable to obtain cash benefits from the investigator's EBT card.

The owner contends that he derived no benefit whatsoever from the alleged \$20.00 cash back transaction. However, in determining whether store ownership benefited from trafficking of SNAP benefits in which it was not directly involved, it is generally assumed that if EBT settlements are made to the store owner's account, the store owner had benefited from such transactions. The store employee, manager, or store owner involved in the trafficking transactions took cash out of the store's cash register and the benefits most likely went into the Appellant's bank account. The Appellant did not submit any documentation to contradict this issue other than the owner statement provided.

With regard to the owner and clerk declarations/statements provided by the Appellant which purport to establish that questionable transactions were legitimate and that no trafficking occurred, the truth of such declarations can neither be confirmed nor denied. Although such affidavits may be sworn to and notarized, that does not mean that they are necessarily truthful. One would not expect store owners and their employees to admit that questionable transactions were not legitimate, were it really so. On the contrary, store owner/clerk statements would be expected to attest to the legitimacy of questionable transactions regardless of whether they were, in fact, legitimate.

With regard to the retailer's contention that, rather than just verifying violations, the investigator offered and persuaded the store clerk to violate seems to imply that the investigator engaged in activity commonly referred to as entrapment. Generally, the entrapment that is forbidden by law depends on whether or not the activity leading up to the violation amounted to putting the activity in the mind of a person who had no prior inclination to violate, and leading him/her to do so for the first time. The U.S. Department of Agriculture's Office of General Counsel maintains that if investigators merely provide an opportunity for a suspected violator to continue on a course of criminal conduct, such activity will not constitute entrapment. In this regard, the investigation record does not contain any evidence indicating activity characteristic of entrapment, nor had the retailer provided substantial evidence to support the claim of entrapment.

The Appellant contends that it did not have the opportunity to question or cross examine the investigator. However, neither the Food and Nutrition Act of 2008 nor the SNAP regulations pursuant thereto provide for evidentiary proceedings at the administrative level of review, and therefore such proceedings are not included in the administrative review process. Rather, the Act and regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in federal court or a state court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue.

The Appellant is correct in that the firm has not been cited for prior SNAP violations. However, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

7 CFR § 271.2 of the SNAP regulations defines trafficking as the "buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone... The Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that "Disqualification ... shall be permanent upon ... the first occasion of a

disqualification based on ... trafficking ... by a retail food store". The law and regulations do not provide for a lesser period of disqualification or sanction for this violation.

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. The Appellant did not provide any evidence that the violations cited in the charge letter did not occur. The preponderance of the evidence in the record supports that trafficking, as defined in the regulations, did occur at the Appellant and that the permanent disqualification was properly applied.

Records Not Provided

The Appellant contends that the firm was not afforded a full and fair opportunity to seek review of all such records. No receipts and documentary evidence were provided with the charge letter or when requested by counsel on December 8, 2021.

The record reflects that via email of December 8, 2021, counsel requested that FNS produce all records reviewed by the Retailer Operations Division or which will be reviewed by the Administrative Review Branch (ARB) in connection with the Appellant's disqualification from the SNAP and this administrative review proceeding, including (but not limited to) all receipts for all purchases by the undercover investigator at the store. Counsel also requested that if this request will be treated as a Freedom of Information Act (FOIA) request, that ARB hold the administrative review in abeyance pending production of all responsive records. Counsel was subsequently advised by the Administrative Review Officer that any requests for documents/information related to the Retailer Operations Division's case against the Appellant must be done so through the FNS FOIA process and counsel was provided the appropriate email for filing such a request. Counsel was also advised that effective October 26, 2020, changes to 7 CFR § 278.6 and 7 CFR § 279.4 went into effect which allow FNS to take administrative action against a firm, even if the firm has submitted a FOIA request or appeal for records. According to recently published regulations: "278.6(p) Freedom of Information Act (FOIA) requests and appeals. A FOIA request or appeal for records shall not delay or prohibit FNS from making a determination regarding disqualification or penalty against a firm under paragraphs (c) and (d) of this section, or delay the effective date of a disqualification or penalty listed in paragraph (e) of this section." Per FNS policy, this regulatory change affected FOIA requests and appeals for records submitted on or after October 26, 2020.

Retailer Discrimination

The Appellant contends that any agency determination based on records never provided to a SNAP retailer is inequitable, unfair, and has discriminatory impacts on retailers based on their religion and national origin, in violation of USDA's civil rights regulations and policies. The owner is Indian-American who practices the Hindu faith.

In accordance with Federal civil rights law and USDA civil rights regulations and policies, the USDA, its agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, sex, disability, age, or reprisal or retaliation for prior civil rights activity in any program or activity conducted or funded by USDA. Stores that are investigated by FNS are not selected based on owner information. Racial,

gender, religious, ethnicity, and nationality information are not collected as part of the SNAP application process. FNS has no way of knowing any of those details about a store owner when conducting a review of a firm/store owner.

Corrective Action

The owner contends that he is implementing some strategies to ensure that these violations do not occur in the future. First, the owner will be upgrading the store's cash register where it will determine EBT categories by scanning items instead of the cashiers putting in items manually. Secondly, the owner will spend more time training employees until they are comfortable with the SNAP rules.

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that it has taken or will take corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Customer Hardship

With regard to the Appellant's contentions that a SNAP disqualification would impose a hardship on area SNAP customers, 7 CFR § 278.6(f) of the SNAP regulations provides for civil money penalty assessments in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. However, this regulation also sets forth the following specific exception to such assessments there under: "A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification". Therefore, since this case involves a permanent disqualification action, the civil money penalty provision is not applicable to the present case.

CIVIL MONEY PENALTY

As previously indicated, the November 9, 2021 determination letter advised the Appellant of the ineligibility for consideration for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations. The letter of charges dated October 27, 2021 advised the Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The regulations specify that such documentation must, in part, establish that there was an effective compliance policy and training program and that both were in effect and implemented prior to the occurrence of violations. The letter indicates that no information was provided by the Appellant for consideration; therefore, on review the Retailer Operations Division's determination that the Appellant firm is ineligible for the imposition of civil money penalties in lieu of permanent disqualification is affirmed.

CONCLUSION

As previously stated, 7 CFR § 278.6(e)(1)(i) reads, in part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” Trafficking is defined, in part, in 7 CFR § 271.2, as “the buying or selling of SNAP benefits for cash or consideration other than eligible food.” The law and regulations do not provide for a lesser period of disqualification for this violation.

Based on a full review of the evidence in this case, the Retailer Operations Division properly imposed a permanent disqualification of Backwoods Grocery, the Appellant, as an authorized retailer in the Supplemental Nutrition Assistance Program. As such, the decision to impose a permanent disqualification against Backwoods Grocery, the Appellant, is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, FNS is releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

January 25, 2022